No. 1240.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

SUPPLEMENTAL AND REPLY BRIEF OF PLAINTIFF IN ERROR.

CHAS. J. HUGHES JR.,
W. E. CULLEN,
Attorneys for Plaintiff in Error

HIESTER, *Printer*, 559 California St.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,

vs.

ST. LOUIS MINING AND MILLING COMPANY,
Defendant in Error.

ASSIGNMENTS OF ERROR XXIII, XXIV and XLIV (Original Brief, page 126).

Ruff et al. vs. Jarrett, 94 Ill. 475:

"The fifth instruction given for appellee is erroneous and should not have been given. It informs the jury that there can be no fraud without an intention to deceive, and unless they were *satisfied* by a preponderance of the evidence. * * * It was also erroneous in saying to the jury that they must be satisfied by a preponderance of the evidence. This was improper, as it imposed a higher degree of proof than is imposed by the law. The jury were only required to believe from a preponderance of the evidence, and not to be satisfied by the proof, as the instruction requires. Satisfactory evidence

almost excludes doubt, whilst belief from a preponderance does not, but leaves the balance in the mind on one side of the proposition."

Stratton vs. Central City Horse Railway Co., 95 Ill. 25:

The court in this case instructed the jury that the defense of contributory negligence must be proved to the satisfaction of the jury. The court says:

"This language is too strong. Juries are required in civil cases to decide facts upon the weight or preponderance of the evidence, and this, too, where the proof does not show the fact in question to the satisfaction of the jury. In such cases the jury may find any given fact in a given way, upon their judgment as to the weight or preponderance of the evidence, though they may have reasonable doubts as to the real truth."

Graves vs. Colwell, 90 Ill. 612:

"The jury are instructed that where a deed is made to one of two persons of the same name, being father and son, the presumption of law, in the absence of evidence upon the subject, is that the deed was made to the father and not to the son, and this presumption must prevail unless the defendants have overcome the presumption by proof showing to the satisfaction of the jury that the deed was made to the son and not to the father. * * *

"2. * * * The burden of proof is upon the defendants to show, to the satisfaction of the jury, that the Thomas Colwell from whom the plaintiff claims title

was not the person who in fact owned the land and held the title for the same; and unless the jury believe from the evidence that the defendant has overcome this *prima facie* case, and shown, to the satisfaction of the jury, * * * they will find for the plaintiff. * * *

"The jury must have understood they were required, notwithstanding they may have believed that the defendants had made out a *prima facie* defense, by proving circumstances of sufficient weight to shift the burden of proof and thereby set aside the rebuttable legal presumption that otherwise would have enabled plaintiff to recover without proving the material fact in issue, and on which his case was predicated, nevertheless, to return a verdict for the plaintiff, even though the weight of evidence was against him, unless the preponderance of proof was so greatly in favor of defendants as to satisfy their minds, a thing which could only be accomplished by producing a state of moral certainty, or, in other words, by proving beyond a reasonable doubt that the son and not the father was intended. The instructions assume and the record shows the evidence was conflicting; in that state of the case, it being a civil suit, it was required of neither party more than that it should produce a preponderant weight of testimony."

Herrick vs. Gary, 83 Ill. 85:

The instruction was: "In order to recover in this case the plaintiff must show, by the evidence in the case, to the satisfaction of the jury, etc."

Of this instruction and the objections to it the court said:

"The objection to this instruction is manifest. The first branch of it places the standard of the degree of proof required higher than the law demands in controversies of this character. It is enough that the jury shall believe from the evidence that the essential facts are true. The jury may so believe, although the same may not be shown by the evidence to the satisfaction of the jury. This instruction requires not merely that the evidence shall produce belief in the mind of the jury of the facts, but that such belief shall be so strong as to be satisfactory. This is, perhaps, not quite so strong as to require a belief beyond a reasonable doubt, but it approximates it, and which is only required in criminal cases. * * * There are subsequent phrases in the instructions which do not seem to demand a degree of proof so high, but the phraseology is not clear and plain, and, as a whole, the instruction was liable to mislead the jury." Judgment reversed.

Wollf vs. Van Housen, 55 Ill. App. 295:

"The court, by one instruction, told the jury, 'before you can find the accused guilty, you must be satisfied, from a preponderance of the evidence, that he had carnal knowledge of said plaintiff forcibly and against her will.' The word 'satisfied', in the first instruction, is too strong. Judgment reversed."

Connelly vs. Sullivan, 50 Ill. App. 627:

The instruction was:

"The jury are instructed that in this case the burden

of proof is upon the party offering the will in controversy for probate, and such party must furnish the preponderance of evidence to establish the validity of the will in controversy; and they must satisfy the jury, by a preponderance of the evidence, that the person who executed the instrument in controversy was Bridget Connelly and no other person, etc. * * * As construed by the supreme court, 'satisfy' and 'satisfied' are words too strong to be applied to the state of mind upon which jurors may act. Judgment reversed."

Mitchell vs. Hindman, 47 Ill. App. 431:

This was an action against a doctor for the recovery of damages resulting from alleged malpractice. The declaration charged that the appellants so unskillfully and negligently performed their duty as such surgeons and physicians that the injured arm became permanently disabled. The court said:

"The instruction offered on behalf of the defendants, as to the character of proof required, and refused by the court, of which complaint is made, was clearly bad. It was, 'The jury are instructed, on behalf of the defendants, that plaintiff in this case is bound to prove, *to the satisfaction of the jury,* by a *clear* preponderance of the evidence', etc. This instruction is defective in the use of the words italicized." (The words italicized are "to the satisfaction of the jury" and the word "clear".

The error complained of was the refusal to give the instruction as requested. The ruling below was affirmed. The case was appealed from the Court of Ap-

peals to the Supreme Court and affirmed there, the Supreme Court saying:

"The sixth instruction asked by the appellant was refused. It was that the plaintiff was 'bound to prove to the satisfaction of the jury by a clear preponderance', etc. This instruction was clearly erroneous. The law only requires that a preponderance of the evidence shall be in favor of the plaintiff."

Gooch vs. Tobias, 29 Ill. App. 268:

Action for trespass for destroying goods.

Instruction: "The court instructs the jury that, while circumstantial evidence is legal and competent in this case, yet in order to make his case by circumstantial evidence, plaintiff must have proved such circumstances *as to satisfy the jury* by a preponderance of the evidence that the defendant committed the wrongful act charged."

It was held that a higher degree of proof was required by this instruction than is required in civil cases, and the judgment was reversed.

Willis vs. Chowning, 40 S. W. Rep. (Tex.) 395:

Instruction: "* * * Unless the evidence before you establishes *to your satisfaction,* etc. * * * The law required Chowning to establish his allegation by the preponderance of the evidence, but the charge of the court required him to produce evidence sufficient to establish greater degree of certainty in the minds of the jury than was demanded by law, which was error, for which this judgment must be reversed."

Texas etc. Co. vs. Ballinger, 40 S. W. Rep. (Tex.) 822:

"This *prima facie* case can only be rebutted by the defendant showing to your satisfaction, etc. * * * In civil cases the party holding the burden of proof is entitled to a verdict if he establishes his cause of action or defense by producing a preponderance of evidence. This preponderance *may not satisfy* the jury, but it is in law all that is required of him. For this error in the charge we are compelled to reverse the judgment."

McGill vs. Hall, 26 S. W. Rep. (Texas) 32:

"The special charge given at the request of appellees required the appellant *to establish to the satisfaction of the jury, by legal evidence, all the material allegations of his cross-bill.* The Supreme Court has condemned charges of this character, and we will follow those decisions and hold likewise. We cannot say that the jury was not influenced by the charge, and we must be in a position to say this before we could hold that an erroneous charge was harmless.

In the cases of *Feist vs. Boothe,* and *Fordyce vs. Chancey,* it was held that the use of the word 'satisfied' in an instruction in a civil case, required too high a degree of proof, and that such instruction constituted reversible error."

Gage vs. Louisville etc. Co., 14 S. W. Rep. (Tenn.) 73:

"The court charged the jury: 'In every law suit the plaintiff says, substantially, "I know the origin and

ccasion of the loss of which I now complain, and will establish to the full satisfaction of the jury, by clear and convincing proof of witnesses I know of, and will introduce, that the defendant, whom I have compelled to come into this court, is responsible in damages to me for the loss." ' This statement of the rule is entirely too vigorous, and puts upon the plaintiff the duty of making out his case beyond a reasonable doubt, which is only required on the part of the State in criminal prosecutions. It is sufficient in civil cases if, after weighing the evidence on both sides, a preponderance is the one way or the other. * * * The burden is upon the plaintiff to make out his case, and he is only required to do so by a preponderance; but when he has done so, he is entitled to recover." Judgment reversed.

McMillan vs. Baxley, 16 S. E. (N. Car.) 845:

An instruction was prayed in which the words "to the satisfaction of the jury" as expressive of the degree of proof required, were used. The court substituted for the words "to the satisfaction of the jury" the words "by a preponderance of evidence." "The phrase 'to the satisfaction of the jury' is considered to bear a stronger intensity of proof than that of 'by a preponderance of evidence'; but we know of no rule of evidence which would require of the plaintiffs a stronger degree of proof than is ordinarily required of the plaintiff in a civil action."

Torrey vs. Burney, 21 So. (Ala.) 349:

"The fifteenth assignment of error is based upon the following instruction given to the jury: 'The undue

influence which will avoid a will must amount to coercion or fraud; and unless the contestant has, by the testimony in this case, *satisfied the jury* the will filed for probate was not the act of Mr. Torrey, but the will of another, and that the same was induced to be made by such influence as amounts to coercion, they will find for the proponent on the issue of undue influence.' It is insisted by contestant that the burden placed by the charge, 'to satisfy the jury' of the coercion or undue influence, is greater than that imposed by the law; that to *satisfy the jury* means that there must be no doubt or uncertainty in their minds, where as all that could properly be required was to reasonably satisfy the jury that there was undue influence. We are of opinion that the objection is well taken. Before it can be said that the mind is 'satisfied' of the truth of a proposition, it must be relieved of all uncertainty, and this degree of conviction is not required, even in criminal cases." Case reversed.

Evans vs. Montgomery, 55 N. W. Rep. (Mich.) 362:

"The court refused to instruct the jury that 'the only testimony offered by the plaintiff in regard to the making of the contract between the plaintiff and defendant is that of the plaintiff himself'; also, that 'you are not authorized to find, except upon clear and convincing proof', etc. The court committed no error in refusing these requests."

Schenk vs. Dunkelow, 37 N. W. Rep. (Mich.) 886:

Action on the case against defendant for trespass upon the person, charging assault and battery combined with aggravated circumstances of ravishment, resulting in pregnancy and the subsequent birth of a child.

"The facts necessary to be proved and the testimony essential to establish them to entitle the plaintiff to recover under the defendant's theory, are fully stated in the following three requests presented by him for the court to charge:

* * * * * * * *

"3. That the right of the plaintiff to recover in this case does not depend alone on the question of whether or not the defendant is the father of plaintiff's child, but on the fact of whether the defendant is guilty of the crime of rape, and unless you are satisfied of the fact that the defendant is so guilty, your verdict must be 'no cause of action'."

On the contrary of this proposition the plaintiff claimed it was not necessary for the plaintiff to show that the assault was committed with such force and violence as to constitute the crime of rape; nor was it necessary to establish any fact in the plaintiff's case by more than a preponderance of the evidence to enable her to recover. The claim of counsel for plaintiff was correct and the defendant's theory was erroneous."

Mitchell et al. vs. Hindman, 150 Ill. 540:

"The sixth instruction asked by the appellants was refused. It was, that the plaintiff was 'bound to prove

to the satisfaction of the jury, by a clear preponderance', etc. This instruction was clearly erroneous. The law only requires that a preponderance of the evidence shall be in favor of the plaintiff. *Crabtree vs. Reed,* 50 Ill. 207; *McDeed vs. McDeed,* 67 *id.* 545; *Peak vs. The People,* 76 *id.* 289; *Bitter vs. Saathoff,* 98 *id.* 266."

Fordyce vs. Chancy, 21 S. W. 183:

"But the special charge requested (No. 5) required that the jury be 'satisfied' that the apprehended results would flow from the injuries. This exacted too high a degree of proof for a civil case, and the charge was properly refused."

O'Donohue vs. Simmons, 12 N. Y. Supp. 843:

"The court also, in stating to the jury that they should be thoroughly satisfied that the conduct of the auctioneer was not merely negligent or careless, was giving them an incorrect standard as to the conclusiveness of proof. In a civil case the jury need not be thoroughly satisfied of any fact claimed to be proven. If there is a preponderance of evidence in favor of the fact, they are bound so to find, whether they are thoroughly satisfied or the proof is conclusive to their minds or not."

Fernandes vs. McGinnis, 25 Ill. App. 167:

"The first and third are objectionable for the reason that they require the plaintiff to make out his case by proof 'to the satisfaction of the jury'.

"In *Herrick vs. Gary,* 83 Ill. 85, the Supreme Court, in commenting upon an instruction containing this requirement, say that it places the standard of proof

higher than the law demands in civil controversies; that it is enough that the jury shall believe from the evidence, the essential facts are true, and that they may so believe, though the same may not be shown by the evidence 'to the satisfaction of the jury'. 'This instruction requires not merely that the evidence shall produce belief in the minds of the jury of the facts alleged, but that such belief shall be so strong as to be satisfactory. This is, perhaps, not quite so strong as to require proof beyond a reasonable doubt, but it approximates it. The mind cannot well be satisfied as to a given proposition so long as such matter remains at all in doubt. For this reason the instruction must be condemned.'

"In the case of *Graves vs. Colwell,* 90 Ill. 612, a similar view was expressed. See, also, *Buchman vs. Dodds,* 6 Ill. App. 25. In each of the cases cited it was held that the error was substantial and calculated to affect injuriously the rights of the party complaining. We must so hold in the present case."

Bauchwitz vs. Tyman, 11 Ill. App. 187:

"This instruction imposed upon the defendant a higher degree of proof than the law requires. In civil suits a preponderance of the evidence is all that is necessary. Here the jury were told that the defendant must *satisfactorily* prove that he had paid the rent. Under such an instruction the jury might have said, 'though we are of opinion that the evidence preponderates in favor of the defendant, we are, nevertheless, not quite satisfied about it, and so we find for the plaintiff.' The instruction, as given, was liable to mislead the jury, and was therefore improper."

Hutchinson Nat. Bank vs. Crow, 56 Ill. App. 567:

"The eighteenth instruction for the interpleader is as follows:

"'The court instructs the jury for the interpleader that when fraud is set up the party alleging fraud must prove it by a preponderance of the evidence, so clear and cogent that it leaves the mind well satisfied that the charge is true. And in this case if you believe from the evidence that the plaintiff in attachment has not so proved the fraud alleged in this case, you should find for the interpleader, if you believe from the evidence the property is his.'

"The law does not require such a degree of proof in a civil suit. It is sufficient if the jury believe a material fact in issue from the evidence, even if the proofs do not generate a belief which entirely satisfies their minds. *Mitchell vs. Hindman,* 47 Ill. App. 431; *Connelly vs. Sullivan,* 50 Ill. App. 629; *Herrick vs. Gary,* 83 Ill. 85; *Stratton vs. Central Ry. Co. etc.,* 95 Ill. 25."

Bryan vs. Chicago, R. I. & P. Co., (Iowa) 19 N. W. 296:

"The language of the court is capable of being understood as conveying the thought that the preponderance of evidence is found only where the mind is fully convinced of the truth of the testimony which controls the decision. This is incorrect. In civil cases a fact may be found in accord with the preponderance of the evidence, and yet the mind may be left in doubt as to the

very trust. The triers of an issue in such cases should, when doubts arise, find for the side whereon the doubts have less weight."

WILLFUL TRESPASS.

ASSIGNMENTS OF ERROR NUMBERS XXIII, XXIV, XXXVIII, XLV, XLVI, XLVIII (Printed Brief, page 127):

In *Golden Reward Mining Company vs. Buxton Mining Company,* 97 Fed. 413, the Eighth Circuit Court of Appeals, opinion by Judge Thayer, said:

"This court has twice decided, as a proposition of general law, and, as we think, in accordance with the decided weight of authority on that point, that a person who invades another's property, and appropriates and removes therefrom valuable timber, and does so in the honest belief that it belongs to him, or that he has the right to appropriate it, can only be held liable to the true owner of the converted property, if it is ore, for its value as it was in place (that is to say, in the mine before it was broken down), whereas, if the trespass was committed willfully and intentionally, or if the trespasser was so far negligent as to justify an inference that he acted knowingly and intentionally, then he may be held liable for the value of the ore taken, with interest thereon from the date of the conversion. * * *"

1 Sherman & Redfield on Negligence, page 6, section 7:

"Exemplary, vindictive or punitive damages can never be recovered in actions upon anything less than

gross negligence. Of this there can be no doubt. There are many reported cases of mere ordinary negligence, in which damages have been awarded by juries to so large an amount as to seem equivalent to exemplary damages; but, where such verdicts have been allowed to stand, it has been upon the ground that the court could not clearly see that the amount awarded was more than a just compensation for the injury. It is often said that exemplary damages may be awarded for gross negligence. But it should be distinctly understood that the gross negligence for which such damages can be allowed, means such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness, and is indifferent, or worse, to the danger of injury to the persons or property of others. And such appears to us to be the construction put upon these words by the courts, in the cases referred to. It is only in cases of such recklessness that, in our opinion, exemplary damages should be allowed."

In the case of *Wabash Ry. Co. vs. Speer,* 156 Ill. 244, the court said:

"But while this may be true, we think it too plain for argument that the instruction, as modified and given to the jury, was erroneous and misleading. After stating that to entitle the plaintiff to recover it must appear that the whistle was needlessly and willfully blown, it proceeds to define those terms as meaning, merely, that the whistle was needlessly blown and that the servant who blew it knew of the proximity of the plaintiff's team to the railway. Mere knowledge on the part of

the defendant's servant of the proximity of the plaintiff's team to the railway was thus made equivalent to or conclusive evidence of willfulness, provided the blowing of the whistle turned out to be needless. The defendant's engineer may have blown the whistle in perfect good faith, and with an honest belief that in blowing he was observing the plaintiff's safety in the best possible way, still, according to the instruction, if it turned out that the blowing was unnecessary, the act was to be deemed willful, wanton or malicious. It needs no argument to prove that such is not, and cannot be, the law."

The law is thus set out in *Black's Law and Practice,* section 152:

"It has been held that a charge of willful injury is not sustained by evidence of mere negligence, nor can proof of willful injury be made under a charge of negligence merely."

And in *Thompson on Trials,* Volume II, Paragraph 2251:

"On like grounds, when the declaration of a suit against a municipal corporation for a personal injury alleged malfeasance merely, and the defendant's proof made out no more than a case of nonfeasance, it was held a proper case for a non-suit."

Durant Min. Co. vs. Percy Con. M. Co., 35 C. C. A. 255;

United States vs. Homestake Mining Co., 54 C. C. A. 305.

The presumption is that the owner of land, mining claim, etc., is the owner of all that lies within its surface boundaries extended downward vertically. This applies to mining claims as well as other real estate.

Wakeman vs. Norton, 24 Colo. 192; 49 Pac. 283:
18 Morrison's Mining Reports, 698:

Syllabus:

"Recovery on Possession. Plaintiff in trespass in possession under paper title may recover without proof of his chain of title against a party defending under a separate title, to wit: a lode dipping underneath the plaintiff's location.

It is to be presumed that the owner of a mining claim is the owner of all deposits of ore within the side lines of the location, until it shall be shown by a preponderance of the testimony that such deposits are part of a lode having its top or apex within the boundaries of another's claim."

Goddard, Judge, in the opinion, says:

"But, assuming that the validity and ownership of the Zona K claim was sufficiently established for this purpose, appellant still contends that the evidence introduced on the part of appellee was wholly insufficient to entitle him to a recovery, since it failed to show that the vein from which the ore in question was taken had its top or apex within the boundaries of that claim, and insists that the burden rests upon appellee to establish the fact that the ore was taken from a vein or lode whose top or apex is within the surface lines of his claim, to entitle him to a recovery therefor. In other

words, that, so long as the intruder does not interfere with a vein whose top or apex is within the surface boundaries of plaintiff's claim, he has no right of complaint, regardless of the fact that ore is taken from within his ground, by one who neither has nor claims the lawful right to take the same.

With this contention we cannot agree. While it is true that the locator of a mining claim takes it subject to the right of others to follow and take ore from any vein on its dip through his ground, the top or apex of which is included within another valid lode location, yet we think he is entitled to the presumption that what is contained within his surface boundaries is his, until the conditions upon which such extralateral right depends are shown to exist, by the one who seeks to avail himself of such right. In *Mining Co. vs. Fitzgerald*, 4 Morr. Min. Rep. 380, Fed. Cas. No. 8,158, Judge Hallett thus concisely states what we believe to be the correct rule in such cases:

'Within the lines of each location, the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as part of some lode or vein having its top or apex in other territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits belong to another lode having its top and apex elsewhere.'

To the same effect are *Doe vs. Mining Co.*, 54 Fed. 935; *Consolidated Wyoming M. Co. vs. Champion M. Co.*, 63 Fed. 540; *Duggan vs. Davey*, 4 Dak. 110, 26 N. W. 887; *Cheesman vs. Shreve*, 16 Morr. Min. Rep. 79, 37 Fed. 36; *Iron Silver M. Co. vs. Elgin M. & S. Co.*, 118 U. S. 196, 6 Sup. Ct. 1177; *Iron Silver M. Co. vs. Campbell*, 17 Colo. 267, 29 Pac. 513.

In this view the plaintiff's evidence was *prima facie* sufficient to show his ownership of the ore taken from within the ground of the Zona K claim, and it devolved upon the defendant to show his right thereto by a preponderance of evidence. The motion for non-suit was properly denied. From this conclusion it follows that, in meeting the burden imposed upon him to show his right to the ore in question by reason of the ownership of a vein or lode the apex of which was included within the surface boundaries of the Ethlena claim, the defendant was entitled to have the jury correctly informed as to the law defining the rights of the owner of such a vein, and prescribing the conditions under which he is entitled to extralateral rights."

Iron Silver Mining Co. vs. Elgin Mining and Smelting Co., 118 U. S. 196:

Syllabus:

"Under the Act of Congress of 1872 (R. S. Sec. 2320 *et seq.*) parallelism of the end lines of a surface location is essential to the existence of any right in the locator or patentee of a surface lode mining claim to follow the vein outside of the vertical planes drawn through the side lines. His lateral right by the statute

is confined to such portion of the vein as lies between such planes drawn through the end lines and extended in their own direction; that is, between parallel vertical planes. It can embrace no other portion."

In this case the court held that the form of the Stone claim was such that it had no extralateral rights, and then concluded with this language:

"The premises in controversy are admitted to be under the surface lines of the Golden Edge claim eastward from the defendant's claim, and the plaintiffs were therefore entitled to recover them."

Leadville Mining Co. vs. Fitzgerald, 4 Morrison's Mining Reports, 380; Fed. Case No. 8,158:

"As a starting point in the evidence before you the fact appears to be established that large quantities of valuable ore have been found in the Carbonate claim. This may be taken to show that a lode exists in that locality in so far as the question relates to the boundaries of that claim. That is to say, if the question for present consideration related to the ownership of ore within the surface limits of the Carbonate claim, it would not be necessary to consider very carefully the position of the ore in the earth. Because within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as part of some lode or vein having its top and apex in other territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator

covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits belong to another lode having its top and apex elsewhere."

Consolidated Wyoming Gold M. Co. vs. Champion Min. Co., 63 Fed. Rep. 540:

Syllabus:

"4. *Same—Burden of Proof.*

Under Statute 1872 (Rev. St. Sec. 2322), giving a locator the right to all veins throughout their entire depth, the apexes of which lie within the surface lines of his claim, though in their course downward they extend outside the vertical side lines of the claim, a locator cannot take mineral from the claim of another without showing by a preponderance of evidence that it is part of a vein having its apex in his own claim."

The opinion is by Judge Hawley, District Judge. At page 550, the court discusses the rights of one asserting an apex and of one owning the surface of a claim beneath which ore is found, and in the course of such discussion, says:

"But the court is not prepared to say that the fact of its existence to that extent has been proven to its satisfaction; and this should be clearly shown before the court would be justified in giving to complainant the right to follow underneath within the surface lines of the New Year's and New Year's Extension claims, belonging to respondent. The respondent has the un-

doubted right to say to complainant, 'Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim, of which you are the owner'. Judge Hallett, in *Leadville Min. Co. vs. Fitzgerald,* 4 Morr. Min. R. 385, Fed. Cas. No. 8,158, expresses the true rule upon this subject, as follows:

'Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as a part of some lode or vein having its top or apex in other territory. In other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one else shall show by a preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere.'

See, also, *Doe vs. Mining Co.,* 54 Fed. 937; *Duggan vs. Davey,* (Dak.) 26 N. W. 892."

Duggan vs. Davey, 26 N. W. Rep. 887:

Syllabus:

"1. *Mining Patents—Rights of Holder as against Intruder—Proof Required.*

One holding the patent of the United States for a mining claim is entitled to challenge the right of any intruder within the lines of his claim, and to require him to justify such intrusion by proprietorship of a

vein having its top or apex in some other claim, and the pursuit of which on its downward course has brought him to the ground in controversy."

Judge Church, in his opinion, at page 890, says:

"It will be observed that there is no controversy respecting the surface of the Silver Terra claim; of that the plaintiffs are in unquestioned possession, and it is unquestionably embraced within their patent. The ore body in controversy is some hundreds of feet below the surface, and has been reached by a tunnel upwards of 600 feet long. Nor are they asserting a right to anything beyond or outside of that segment of the earth which would be included within planes extended vertically downward through the lines of their claim. They are merely resisting an encroachment upon mineral deposits within that segment. Let us consider, therefore, the nature and incidents of the title acquired by possession, location and patent of mineral lands.

The common law rule is familiar. The ownership and possession of the soil extended to the center of the earth, and *usque ad caelum,* and included everything upon its surface and within its bosom. We find that the thing, the substance of which the United States statute treats, is 'lands valuable for minerals,' and that it is for the disposition of these 'lands' that provision is made in chapter 6 of the Revised Statutes. It is the 'lands' in which mineral deposits are found which are 'open to purchase.' It is 'land' claimed and located for valuable mineral deposits, which is the subject of application for patent, and where patent of the United States

issues, it is for the 'land', at so much per acre. The definition of 'land' given in our territorial statute is concise: 'The solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.' In the absence of anything in the statute to the contrary, we think it might well be concluded that one becoming the owner or possessor of any of these lands would hold them with and subject to all the incidents of ownership and possession at common law. It should be borne in mind that before the enactment of any statute recognizing and regulating his possessory rights, the mining locator, as between himself and the United States, was technically a mere trespasser upon the public domain; and that even although he might have conformed in his location to the rules and customs adopted in the mining district in which his claim was situated, yet, so far as any legal right existed to hold his claim against a new-comer, that right rested upon possession merely; hence the statute. Rev. St. U. S., Sec. 910.

The government, however, having, in pursuance of its policy of encouraging the discovery and development of its mineral wealth, long tacitly recognized the possession of the miner, has now, by statute, not only given an express license to those establishing their possession in the prescribed method, and provided a way by which the locator may become the owner in fee of the land embraced within the lines of his claim, but has also declared that such locators 'shall have the exclusive possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes

and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations.' This statute undoubtedly introduced an important modification of the common law rule. It gives to the proprietor of a vein a right unknown to the comon law—the right to pursue such vein beyond his own lines, outside of that particular segment of the earth embraced within the lines of his claim extended vertically downward; and it is therefore, to that extent, an enlargement of his common law right. But, on the other hand, inasmuch as the same right is granted to every locator under the statute, each holds his possession subject to the same right in others, and is therefore liable to have his land entered by an adjoining proprietor pursuing his vein in its course beyond his own side lines; and to this extent, therefore, his common law possession is abridged.

Two points cannot fail to be noticed in this connection: First, that this enlargement of the common law possessory right is incident only to a claim located in the manner provided by law; and second, that the exercise of such right operates to the abridgment of the possession of every tenement penetrated or intersected by a vein having its top or apex in a superior tenement.

Such I understand to be the effects of the statute. I am unable to see that in any other particular essential to this controversy the rights of possessors of mineral

lands differ from those of other lands. Says Justice Hallett, in the case of *Leadville Min. Co. vs. Fitzgerald,* 4 Morr. Min. 385: 'Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as a part of some lode or vein having its top or apex in other territory. In other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere.' And in the case of *Colorado Central vs. Equator Min. Co.,* the same learned Judge remarks: 'Generally, it may be said that a patent for a lode will convey all valuable deposits within the tract described, except such as may belong to lodes and veins which outcrop elsewhere, and come into the tract in their downward course. *Prima facie* the patentee must be the owner of all that lies within his lines. * * * Every owner by patent shall be sovereign in his own domain, and when he goes beyond it he shall recognize the equal rights of others to the same protection.' The United States Supreme Court, in *Forbes vs. Gracey,* 94 U. S. 767, says that the patentee 'obtains the government title to the entire land, soil, mineral, and all,' and declares that the only distinction between the patentee and the locator is in the ownership of the fee. See, also, *McCormick vs. Varnes,* 2 Utah, 362; *Wolfley vs. Lebanon Min. Co.,* 4 Colo. 114; *Pacific C. Min. & M. Co. vs. Spargo,* 8 Sawy. 645;

s. c. 10 Fed. Rep. 348. That actual possession is good and sufficient evidence of title, as against a mere intruder, is established by numerous well-considered cases. I cite a few only: *Grover vs. Hawley,* 5 Cal. 485; *English vs. Johnson,* 17 Cal. 108; *Crossman vs. Pendery,* 8 Fed. Rep. 693; *North Noonday Min. Co. vs. Orient Min. Co.,* (on motion for new trial) 6 Saw. 507; s. c. 11 Fed. Rep. 125; *Golden Fleece* case, 12 Nev. 321; *Burt vs. Panjaud,* 99 U. S. 180; *Campbell vs. Rankin, id.* 261; *Trenouth vs. San Francisco,* 100 U. S. 251; Rev. St. U. S. Sec. 910.

It would seem, therefore, that one holding a mining claim by mere possession, while on the one hand not receiving that enlarged right incident to a valid mining location, and on the other hand being subject to intrusion by the lawful proprietor of any vein which may be found in its course downward to penetrate or intersect his claim, holds his claim in other respects with and subject to the incidents of possession at common law; and may defend his possession of the surface, and of that segment of the earth included within his surface lines extended vertically downward, with all that it contains, against every one not claiming under superior title. A *fortiori,* therefore, is one holding the patent of the United States for a mining claim entitled to challenge the right of any intruder within the lines of his claim, and to require him to justify such intrusion by proprietorship of a vein having its top or apex in some other claim, and the pursuit of which on its downward course has brought him to the ground in controversy. Undoubtedly, were the plaintiffs seeking to enforce a

similar right, they would be compelled to prove what the defendant so urgently insisted upon his motion that they must prove, viz., all the incidents of a valid mining location under the laws regulating the same, and that the ore body in controversy was part of a vein of which, by virtue of such location, they had become proprietors; but, as we have already seen, such is not the position of the plaintiffs, while on the other hand it is precisely the position occupied by the defendants, and it is just this which renders the doctrine of many of the cases cited by the defendants, as for instance, *Stevens vs. Williams,* 1 McCrary, 480; *Zollars vs. Evans,* 2 McCrary, 39; s. c. 5 Fed. Rep. 172; *Van Zandt vs. Argentine Min. Co.,* 2 McCrary, 159; s. c. 8 Fed. Rep. 725; *Jupiter Min. Co. vs. Bodie Min. Co.,* 11 Fed. Rep. 669; see, also, *Stevens vs. Gill,* 1 Morr. Min. 581,—inapplicable to the case of the plaintiffs, while entirely pertinent to the case of the defendants."

Iron Silver Min. Co. vs. Campbell, 17 Colo. 267:

Syllabus:

"3. *Following Vein Beyond Side Lines—Burden of Proof.*—A patent gives a *prima facie* right to the patentees to the exclusive possession of the premises covered by the patent. When others rely upon a right to follow into the patented territory a vein, which they claim has its top or apex outside the premises covered by such patent, the burden of establishing such right rests upon them."

At page 275, Chief Justice Hayt, delivering the opinion, says:

"The plaintiffs by the introduction of their patent established a *prima facie* right to the possession of the premises in controversy, and we are unable to find any admission in the complaint sufficient to overcome such *prima facie* showing. Appellants, relying upon a claim of right to follow their vein into the territory included within the side lines of plaintiff's claim were properly held to have had the burden of proving such claim."

Doe vs. Waterloo Mining Co., 54 Fed. Rep. 935:

Syllabus:

"1. *Mines and Mining—Patents—Right to Follow Dip.*

The patentee, and even the mere possessor, of a mining claim, under license from the government, has a right to all mineral lying vertically beneath the surface of his claim, subject only to the right of the lawful possessor of a neighboring claim having parallel end lines to follow any lode, the apex of which lies within his claim, on its dip within the limits of infinite planes vertically projected through such end lines. An unlawful possession has no such right to follow the dip. *Montana Co. vs. Clark*, 42 Fed. Rep. 626, disapproved. *Duggan vs. Davey*, (Dak.) 26 N. W. Rep. 887, approved. *Reynolds vs. Mining Co.*, 6 Sup. Ct. Rep. 601, 116 U. S. 687, distinguished."

Ross, District Judge, in his opinion, says, at page 937:

"Three questions have been presented, and ably and

elaborately argued by counsel, and upon one of which a large mass of testimony has been taken.

The first is presented by the defendant, and is to the effect that the certificates, which it is conceded are to be regarded, for the purposes of this case, with like force and effect as patents, held by the complainant, confer upon him no right to anything except the surface of the ground within the surface lines of the claims, and such veins, lodes or ledges as have their apex within such surface lines, and that the holder of such certificates has no cause of complaint against any one who enters and mines, even without any right in himself, under the surface of such lode claim, so long as he leaves the surface undisturbed, and does not interfere with any vein, lode or ledge having its apex within the surface lines of such claim or claims. To this I cannot assent. It is true it was so decided in *Montana Co. vs. Clark,* 42 Fed Rep. 626. But the opposite conclusion was reached in what I consider the better reasoned case of *Duggan vs. Davey,* (Dak.) 26 N. W. Rep. 887. It is entirely true that whoever takes a grant of a lode claim takes it subject to the provision of the statute reserving to locators of other mining claims the right to follow under its surface, for the purpose of extracting the ore therefrom, any vein, lode or ledge the top or apex of which lies within the surface lines of such other location. Rev. St., Sec. 2322. But until some one comes clothed with that reserved right, the holder of a government patent or certificate has, I think, the just and legal right to say, 'Hands off of any and everything within my surface lines extending vertically down-

ward.' There mere possessor of a mining claim under license from the government would have that right; a *fortiori,* the holder of a conveyance from the government. For it must be remembered that the extralateral right conferred by the statute is but an incident of a valid lode location. By the express language of the statute the right given is to 'the locators of all mining locations,' etc. Without such location the incidental extralateral right does not exist. It could not therefore exist in a stranger to the paramount source of title. While the real object of grants of the nature of those under consideration is the mineral, the statute makes provision, as stated in *Duggan vs. Davey,* for the disposition of 'lands valuable for mineral.' 'It is the 'lands' in which mineral deposits are found which are 'open to purchase.' It is 'land' claimed and located for valuable mineral deposits which is the subject of application for patent, and where patent of the United States issues it is for the 'land' at so much per acre.'

Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law. That seems to have been the view of Judge Hallett, in *Mining Co. vs. Fitzgerald,* 4 Morr. Min. Rep. 385, where he says:

'Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as a part of some lode or vein having its top or apex in other terri-

tory. In other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one else shall show by preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere.'

This must also have been the opinion of the Supreme Court in *Iron Silver Mining Co. vs. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177, otherwise the judgment in that case could not have been affirmed; for the defendant there offered to prove, among other things, that the vein, lode or ledge it admitted it had followed from the Stone claim into and under the surface of the Gilt Edge claim, and in and upon which it admitted it was mining, had its apex within the surface lines of the Stone claim, and—

'That the vein, lode or ledge on its dip, within vertical planes drawn downward through the end lines of the vein, lode or ledge, so existing and found within the Stone surface mining claim, and continued in their own direction,—namely, in the direction of the dip of the vein, lode or ledge, passed through, out of, and beyond the east vertical side line of the Stone surface claim and location into lands adjoining, to wit: into and under the said Gilt Edge surface claim.'

To which plaintiff objected on the ground that the proffered proof would not be a defense to the action, nor tend to establish a defense thereto, and that, by reason of the surface form or shape of the Stone claim,

its owners had no right, under the laws of the United States or otherwise, to follow the lode alleged to exist thereon in its downward course beyond the lines of the claim and into the plaintiff's claim, and that no part of the Gilt Edge claim, or the mineral or lode within it, was within vertical planes drawn downward through the end lines of the Stone claim, and continued indefinitely in their own direction. The lower court sustained the objection, and excluded the evidence offered, to which ruling the defendant excepted. The supreme court held that, in view of the facts of the case, the defendant did not have the extralateral right conferred by the statute, and affirmed the action of the lower court excluding the proffered proof. But if, as is contended here, any stranger could pursue such a vein, lode, or ledge upon the theory that it constituted no part of the claim under the surface of which it was found, defendant in that case would have been entitled, even though a stranger to the paramount source of title, to have pursued the vein, lode, or ledge, and the judgment of the lower court must have been reversed for refusing the proof that was offered.

* * * * * * * * * *

In *Cheesman vs. Shreve,* 37 Fed. Rep. 36, Judge Brewer, now an associate justice of the supereme court, held that, where parties enter beneath the surface within the side lines of a lode claim patented to others, they are *prima facie* trespassers, and must justify their entrance, or they will be restrained. I am of opinion, therefore, that the certificates of purchase issued by the government to the complainant make a *prima facie*

case for him, and that the burden is upon the defendant to justify its entry and mining beneath the surface of complainant's claims, by showing—first, such a location of the Silver King as under the law entitles it to follow any vein, lode, or ledge having its apex within its surface lines, outside its side lines extended vertically downward; and, second, that the acts of mining committed and threatened to be continued by it under the surface of complainant's claim were and are upon a vein, lode, or ledge having its apex within the surface lines of the Silver King claim, and which in its dip downward passes outside of the side lines of that claim, extended vertically downward, and into and beneath the surface of complainant's claim, and which lies between vertical planes drawn through the end lines of the Silver King, continued in their own direction."

Morrison's Mining Rights, Eleventh Edition, page 170:

"Presumption—Burden of Proof.

The presumption, where a miner is found beyond his side lines, is against him. He is *prima facie* a trespasser till he has shown that he gets there by following the lode on its dip from its apex within his lines. *Cheesman vs. Shreve,* 16 M. R. 79; *Blue Bird Co. vs. Murray,* 23 Pac. 1022; *Bell vs. Skillicorn,* 28 Pac. 768; *Cons. Wyoming Co. vs. Champion Co.,* 63 Fed. 540; *Iron S. Co. vs. Campbell,* 17 Colo. 267; *Dugan vs. Davey,* 4 Dak. 110; *Leadville Co. vs. Fitzgerald,* 4 M. R. 380; *Doe vs. Waterloo Co.,* 54 Fed. 935; *Maloney vs. King,* 64 Pac. 351."

Barringer and Adams, Law and Mines and Mining, Page 442:

"The presumption in the first place is that all minerals found within his boundary planes belong to the owner of the claim. And upon a stranger claiming the right to mine inside of these planes rests the burden of proving that he is mining upon the dip of a vein whose apex is outside of the claim, and within a claim belonging to him. That is, in order to establish his right and justify the apparent trespass, he must prove that he is the legal possessor of the vein which he is following. If he fails to establish *both* of these points he is a trespasser."

Empire State-Idaho Min. & D. Co. vs. Bunker Hill & S. Min. & C. Co., 114 Fed. 417:

At page 418, Ross, Circuit Judge, says:

"The ore bodies in controversy, and which were awarded to the defendant in error by the judgment of the court below, lie beneath the surface of the Likely, Skookum and Cuba claims. As these three claims are also, according to the findings, the property of the plaintiff in error, *prima facie* the ore bodies in question belonging to it. *Cheesman vs. Shreve,* (C. C.) 37 Fed. 36; *Mining Co. vs. Murray,* (Mont.) 23 Pac. 1022."

Lindley on Mines (2nd Ed.) Vol. II, Section 615, page 1110:

" * * * While an apex proprietor pursuing his vein on the dip underneath adjoining lands is called upon to overcome certain legal presumptions flowing from surface ownership, so far as the conditions within

his own boundaries are concerned he is entitled to such presumptions of fact as rationally flow from other facts satisfactorily established."

The portion here cited is that which ends with the words "surface ownership," and in a note to which the author has cited the following cases:

Leadville M. Co. vs. Fitzgerald, 4 Morr. Min. Rep. 380, Fed. Cas. No. 8, 158;

Iron S. M. Co. vs. Campbell, 17 Colo. 267, 29 Pac. 513;

Cheesman vs. Shreve, 37 Fed. 36;

Cheesman vs. Hart, 42 Fed. 98;

Jones vs. Prospect Mt. T. Co., 21 Nev. 339; 31 Pac. 642;

Bell vs. Skillicorn, 6 N. Mex. 399; 28 Pac. 768;

Wakeman vs. Norton, 24 Colo. 192, 49 Pac. 283;

Lincoln Lucky and Lee M. Co. vs. Hendry, 9 N. Mex. 149, 50 Pac. 330;

Parrot S. & C. Co. vs. Heinze, 25 Mont. 139, 87 Am. St. Rep. 386; 64 Pac. 327;

Maloney vs. King, 25 Mont. 188, 64 Pac. 351;

Calhoun G. M. Co. vs. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607;

State vs. District Court, 25 Mont. 572, 65 Pac. 1020;

St. Louis M. & M. Co. vs. Montana M. Co., 113 Fed. 900;

Empire State-Idaho M. and D. Co. vs. Bunker Hill and Sullivan M. Co., 114 Fed. 417.

See, for discussion of presumptions and burden of proof in cases of underground trespass,

Lindley on Mines (2d Ed.), Sec. 866.

THE DECISION OF AN INTERMEDIATE COURT IS NOT *res adjudicata.*

Calhoun G. M. Co. vs. Ajax G. M. Co., 27 Colo. 9:

"It is contended by counsel for appellee that the ruling in *Branagan vs. Dulaney* and cases following it, is wrong and that this question should now be considered. In opposition to a reconsideration of the rights of cross lode claimants, as declared by those cases, it is urged that the doctrine of *stare decisis* applies, and even if wrong, should not now be disturbed, because the rule therein announced has been established for such great length of time as to become a settled rule of property in this State. We are aware of the gravity of reversing a long established precedent, and realize that it should not be disturbed except for the most cogent reasons; that the people of this Commonwealth have a right to presume that when a question has been once settled by this court that its decision is correct and that all may rely upon it. We understand, generally, that when a decision has established a settled rule of property, upon which rights are predicated (and especially those relating to real estate), the law will be adhered to by the court announcing it, and those bound to follow its adjudications, even if erroneous (*Black on Interpretation of Laws*, Sec. 152), but this rule is not inflexible. Courts are not bound to perpetuate errors merely upon

the ground that a previous erroneous decision has been rendered on a given question. If it is wrong, it should not be continued, unless it has been so long the rule of action, and relied upon to such an extent, that greater injustice and injury will result by a reversal, though wrong, than to observe and follow it. *Black on Interpretation of Laws, supra; Sutherland's Stat. Constr.*, sec. 316; *Boon vs. Bowers,* 30 Miss. 246."

Davidson vs. La Plata County, 26 Colo. 552:

"The decision of the court of appeals is not *res adjudicata.* It has been held by this court in the case of *Brown vs. Tourtelotte,* 24 Colo. 204, that the doctrine of the law of the case does not apply to decisions of the court of appeals in cases where their finaly determination may ultimately rest with the supreme court. This sufficiently disposes of the claim in that behalf made by the defendant in error."

Brown vs. Tourtelotte, 24 Colo. 204:

Syllabus:

"1. *Law of the Case.*

"A decision by the court of appeals in a case the final decision of which may ultimately rest with the supreme court does not constitute the law of the case, although it may not have been reviewable in the first instance upon appeal to or writ of error.

"2. *Same.*

"The doctrine that the law of the case as announced by an appellate court is conclusive in subsequent pro-

ceedings does not apply to the decisons of intermediate courts, but only to appellate tribunals which are also courts of the last resort."

WILFUL TRESPASS MUST BE PROVED; IT IS NOT PRESUMED FROM THE COMMISSION OF THE TRESPASS.

The Court in its charge instructed the jury that if it found from the evidence, under the Court's instructions, that the vein in question had its apex in territory belonging to the plaintiff, and the plaintiff had a right to follow it under the surface of the defendant, and the defendant had mined ore from it, then the trespass committed was presumed to be wilful, and that the burden was upon the defendant to prove that it was honest, or inadvertent in its character.

This instruction was given for the purpose of enabling the plaintiff to recover punitive or exemplary damages. Its effect was to charge that whenever a trespass was committed the presumption was an wilful trespass.

Our position is that where a trespass is alleged to be wilful, and this fact is used to enhance the damages, and to give to the plaintiff more than its loss,—something beyond compensation for the property taken, then the plaintiff must prove that the trespass was not only unlawful, but that the facts existed which entitled it by way of smart money, to these enhanced damages. This is but stating that when a plaintiff alleges a fact as the basis of a recovery and this fact is denied that it must prove it.

Murray vs. Pannaci, 130 Fed. 31:

"~~Any~~ In trespass to justify the imposition of exemplary or punitive damages, something more must be shown than the doing of an unlawful or injurious act. There must be evidence that the injury was inflicted maliciously or wantonly, or with circumstances of contumely and indignity, or at least with wrongful motive."

Day vs. Woodworth, 13 How. 363;
Philadelphia etc. R. R. Co. vs. Quigley, 21 How. 202;
Milwaukee etc. R. R. Co. vs. Arms, 91 U. S. 489-493.
Fohrmann vs. Consolidated Traction Co., 63 N. J. L. 391.

"None of these things, we think, could be justly imputed to the defendant here under the evidence."

Thomas vs. Southern, 30 S. E. 343;
Alabama vs. Arnold, 4 So. 363;
Hansley vs. Jamesville, 32 L. R. A. 543, 117 N. C. 565;
Craven vs. Bloomingdale, 171 N. Y. 450;
Kern vs. Warfield, 60 Miss. 808.

"Again appellant failed to show any carelessness or recklessness in the cutting of the trees or any lack of reasonable precaution in endeavoring to ascertain the boundaries of appellees' land.

Therefore, even conceding the agency and authority of Farlow, appellee would only be liable for the actual value of the timber cut."

Compton Al. & Co. vs. Marshall, 29 S. W. 1058.
3 Elliott on Evidence, Section 2149:

"The burden rests upon the party who assails the faith of a transaction or conveyance to show that it was fraudulent by either direct or circumstantial evidence.

In the absence of evidence to the contrary, the law presumes that every man performs his business transactions in good faith and for honest purposes; and any one who assails the transactions or alleges that it was done in bad faith or for a dishonest and fraudulent purpose has the burden of showing the fraud or bad faith."

R. R. Co. vs. Varnell, 98 U. S. 479;
Jones vs. Simpson, 116 U. S. 609;
Pruitt vs .Wilson, 103 U. S. 22;
Gulf etc. R. R. Co. vs. Johnson, 54 Fed. 474;
Wilson vs. Fuller, 9 Kan. 365;
Hatch vs. Bayley, 12 Cushing, 27;
Stewart vs. Thomas, 15 Gray, 145;
Boughman vs. Penn, 31 Kan. 504;
Elliott vs. Stoddark, 98 Mass. 145;
Walker vs. Collins, 50 Fed. 737;
Walker vs. Collins, 59 Fed. 70.

REPLY POINTS.

Defendant in Error stoutly asserts that the Court below was concluded, and the Plaintiff in Error absolutely bound by what it asserts was the decision of this Court, to wit: That the deed made by the Defendant in Error to the Plaintiff in Error did not convey and was not intended to convey all the mineral contained in

the compromise ground, and to support this contention cites the following extract from this Court's Opinion in 102 Fed. 430: "It is not to be supposed that the owners of the St. Louis claim intended by the compromise contract not only to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extra-lateral rights—rights that had not been in litigation and had not been assailed by the owners of the adjoining claim. To manifest such an intention the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient."

This quotation makes clear the fact that this Court in construing the contract back of the deed and in contdolling the deed by its construction of the contract went outside of deed and contract to what was claimed to be the relations of the parties to the matters in controversy, and reduced the grant of the deed and the scope of the contract so as not to give more to the Plaintiff in Error than the Court estimates would have been recovered by it had it been successful in its contentions. Insisting most strenuously on the position taken in the original Brief as to the doctrine of the "law of the case", as applied to this controversy, and also to the position of the Plaintiff in Error that the deed is complete in itself, and conveyed what is described therein to the extent and with all the incidents pertaining to a common law grant, and that the quoted words emphasize and make unmistakable the purpose

of the instrument, conveyed to the extent of all interest therein of every nature held by the Defendant in Error the premises described, and all mineral therein contained. We find in this quotation and the position of this Court, based thereon, perfect reason for reversing this cause and for modifying the original opinion to conform to the real facts now brought to the attention of this Court. There was in controversy between these litigants, not merely the compromise ground, but an extensive area and apex rights, which did not affect the compromise ground. There was a compromise and not a concession, by the St. Louis Company to the Nine Hour People of all the ground in dispute. If the Nine Hour People had succeeded in their contentions, they would have obtained the compromise ground, the entire apex relied upon by the Defendant in Error and much additional ground and apex rights and a decision making the Nine Hour claim superior to the St. Louis claim and entitling the Nine Hour claim under the principles announced by this Court in the 104 Fed., to follow the vein upon its dip, wherever it possesses only a part of the width of the apex. No theory or doctrine of "the law of the case" prevents the parties, upon a new trial which is by the mandate unlimited in its character, from testing the sufficiency of the evidence introduced, and from adding to its own testimony at the new trial. In this trial there was introduced, and offered to be introduced in evidence to prove that the ground in controversy was greater in extent than the compromise ground; that it was first located as a part of the Nine Hour location, and then

improperly surveyed in by the St. Louis. Had these facts, now in the case and before the Court, been before this Court on the former hearing, it could not have construed the deed and contract as it did construe them, for the very foundation of that construction is established as having been non-existant. Whatever duty was upon the lower court to observe and follow the opinion of this Court on the former Writ of Error it cannot be claimed to extend to an application of it to facts entirely different from those made the basis of it by this Court.

In view of these facts the true significance of the words employed become apparent and should have their full and natural meaning, such as is required by the canon of construction which requires to be given to all words of contracts and conveyances their ordinary significance.

If extraneous matters should be considered to affect the meaning of a contract and deed, then all such facts should be considered. This the lower court refused to do and now for the first time this Court is given an opporunity to do so. The result of a consideration of these facts negatives the infernce of the Court on a partial presentation of the facts. There was nothing in the opinion of this Court on the former Writ of Error nor in the mandate, to the effect that the Defendant in Error should take judgment without introducing evidence, or that the new trial should be limited to a consideration of the former testimony and such is not the law when new trials are awarded, as in this case. The Defendant in Error for the sake of the advantage

which it hoped to secure through a new trial, granted because of the decision of Judge Knowles on the question of divided apex, took the new trial. The Supreme Court held in this case when before it, that there had not been a final decision in the cause, but a new trial generally. The case therefore stood at the new trial as all cases in which new trials are granted, with liberty to either party to strengthen its case by new testimony, and by attacks upon its opponent's testimony, as is so often done.

This Court has never passed upon, and the trial court in this case refused to pass upon the contention of the Plaintiff in Error that there had been an adjudication in the State Court, in Montana Company *vs.* St. Louis Co.—the Specific Performance case, of the right of the Plaintiff in Error, to a conveyance of the compromise ground, and of all minerals therein contained.

It is contended that all the court below could do under the decision of this Court on the former Writ of Error was to hold an inquest of damages. Had this been the determination of this Court, there would have remained a final judgment of the court below confirmed by this Court, and therefore reviewable by the Supreme Court of the United States. The Supreme Court of the United States expressly held that this position could not be maintained. In cases cited by Defendant in Error in which the inquiry under the mandate was limited, it will be found that the mandate directed something, and did not generally grant a new trial. This is notably true in

Empire State Mining Company vs. Hanley, 136 Fed. 99;

Thompson vs. Maxwell, 168 U. S. 451.

Each of these was a suit in equity. The decree of the lower court was modified and specific directions given for definite proceedings thereunder which only permitted specific and limited inquiries. In neither was a mandate such as was issued by this Court issued, nor a new trial awarded. In neither case were the parties required, or permitted, to introduce all the evidence upon which the judgment was to be based. The proceeding required was special in its nature, of narrow scope, employed for the purpose of enforcing the modified decree, or making special investigations to clearly define the purpose of it. In *Thompson vs. Maxwell,* 168 U. S. 451, Justice Brewer quotes from the mandate in the former appeal, the folloiwng: "Our conclusion is that the present decree must be reversed with costs, and that the cause be remanded to the court below with directions to allow the complainants ~~the~~ to amend ~~ment of~~ their bill, as they shall be advised, and with liberty to the defendants to answer any new matter introduced therein, and that all the ~~parties~~ proofs in the case shall stand as ~~parties~~ proofs upon any future hearing thereof with liberty to either party to take additional proofs upon any new matter that may be put in issue by the amended pleadings."

AREA IN CONFLICT IN THE ADVERSE SUIT.

That the area in conflict in the adverse claim suit of the Nine Hour owners was 1.98 acres is conclusively

shown by the Nine Hour patent (Record, page 154). The rules of the Interior Department governing the survey of mining claims for patent, are found set out at length in *Del Monte vs. Last Chance Mining Company,* 171 U. S. 55.

By reference to these rules or regulations it will be seen that it is prescribed—

"1. The exterior boundaries of the claim should be represented on the plat of survey and in the field notes.

2. The intersection of the lines of the survey with the lines of conflicting surveys should be noted in the field notes, and represented upon the plat.

* * * * * * * * * *

4. The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey substantially as follows:

It will be seen, first, that the Supreme Court of the United States takes judicial notice of these rules and regulations.

Second: That the plat found in the Nine Hour patent, which was introduced in evidence on the trial of this case without objection, conclusively shows that the area in conflict was as we claim it, 1.98 acres, and included therein is the small fraction thereof now known as the compromise ground.

In addition to this, of course, there is the testimony of Mr. Farmer, who measured the ground, the offered testimony of other witnesses who were acquainted with

the facts, and the maps introduced and used on the trial of the case, all showing this exact area.

It may be noted that the second interrogatory propounded in this case, which Mr. Justice Brewer says is sufficiently answered by the answer they have given to the first interrogatory, also arises in the case at bar.

THE MOTION FOR A NEW TRIAL.

For some reason which we cannot divine, the counsel for the Defendant in Error have subjoined to their Brief, the memorandum opinion delivered by Judge Hunt in overruling our motion for a new trial. What object they could have in doing so we cannot fathom. It is certainly a new practice. The denial of a motion for a new trial cannot be assigned as error, and is not assigned as such in our record. It would therefore seem that this opinion could not serve any good purpose. The only reason that we can conceive which would induce them to attach this opinion to their Brief, and thus bring it before this Court, is in a measure to justify the enormous and outrageous verdict which the jury rendered in this case. Our motion for a new trial was grounded mainly upon the excessiveness of this verdict, and the evidence upon which it was based was incontrovertible and, we think, absolutely conclusive, and yet, although it was strenuously argued when our motion for a new trial was presented, it may be noted as something out of the usual course which courts ordinarily pursue, that in this opinion no reference whatever is made to the evidence upon which this part of the motion was based. Our motion was based upon what is shown by Exhibit "J" (Record, p. 133).

There was no conflict in the testimony that practically all of the ore mined out of the area in dispute was thus mined out and extracted between the months of November, 1898, and May, 1899. The further fact is proven beyond contradiction that all of the ore mined from this particular ground was worked in what is known as the 20 side of the 50 Stamp Mill of Plaintiff in Error.

This side was fitted properly for working ores, carrying considerable values in silver, which it is shown these ores carried, and there is indisputable testimony that all of it was worked through this portion of the mill save a very small part which was shipped directly to the smelter.

In addition to the ore coming out of the territory in dispute, ores from other parts of the mine were worked in this part of the mill between these periods—there was no separation of ores.

We had a deed for this property based on the judgment in the Specific Performance case, giving to us every pound of ore there was in that ground, and enjoining the Defendant in Error from asserting any claim, or right, or interest in the ground or any part of it. There was therefore no necessity of separating this ore from other ores that came from the mine and were of substantially the same character, to wit: high in silver values.

Turning now to Exhibit "J", the columns marked "s t" and headed "Tons in 20 side", shows that during this period of time 8563.2 tons of ore were worked

through this part of the mill. Going to column "V", headed "20 stamp bullion contents": The amount recovered for each month is given and the total aggegates $123,602.21. This total number of tons of ore mined from the disputed ground, and for which the Defendant in Error claims damages, amounted to a trifle over three thousand tons of the total 8563 tons worked, and yet they have damages against us for $195,-000. Is this not far more satisfatcory proof as to the actual value of the ore worked than the wild guess of an interested expert who bases his conclusions on the assay value of four choice picked samples taken from the rich ore lying along the north side of the Montana Company's apex shaft? Here was the amount which plaintiff realized out of the 3000 and odd tons claimed by the Defendant in Error, together with that recovered from five thousand and odd other tons of ore, and yet the total amount was as stated, $123,602.21. This verdict was manifestly so excessive as to more than justify the Court in the exercise of a sound discretion, in granting us a new trial.

CHAS. J. HUGHES JR.,
W. E. CULLEN,
Attorneys for Plaintiff in Error.